ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals
for the
District of Columbia Circuit

Nos. 18-1001 and 18-1036

CAYUGA MEDICAL CENTER AT ITHACA, INC.,

Petitioner,

– v –

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF FOR PETITIONER

Raymond John Pascucci
BOND, SCHOENECK & KING, PLLC
Attorneys for Petitioner
110 West Fayette Street
One Lincoln Center
Syracuse, New York 13202
(315) 218-8000
rpascucci@bsk.com

CORPORATE DISCLOSURE STATEMENT

Petitioner-Cross-Respondent Cayuga Medical Center at Ithaca discloses it is not a publicly held corporation, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Cayuga Medical Center certifies the following:

A. Parties

1. Petitioner/Cross-Respondent: Cayuga Medical Center at Ithaca, Inc.

2. Respondent/Cross-Petitioner: National Labor Relations Board

B. Ruling Under Review

The Decision and Order of the National Labor Relations Board entered in Consolidated Case Nos.: 03-CA-156375, 03-CA-159354, 03-CA-162848, 03-CA-165167, 03-CA-167194 on December 16, 2017, finding that Petitioner violated sections 8(a)(1) and (3) of the National Labor Relations Act and ordering certain relief.

C. Related Cases

This case has not been previously before this or any other court. Counsel is unaware of any related cases currently pending before this Court or any other court.

JURISDICTIONAL STATEMENT

This is a Petition for Review from a Final Decision and Order of the National Labor Relations Board ("Board") issued on December 16, 2017, published at 365 NLRB No. 170 ("Decision"). This Court has jurisdiction to review the Decision pursuant to 29 U.S.C. § 160(f).

Cayuga Medical Center timely filed its Petition for Review in this Court on January 2, 2018, and pursuant, to the Court's April 5, 2018 Order, Cayuga Medical Center timely submits the instant brief.

STATEMENT OF ISSUES

The questions presented by Cayuga Medical Center ("CMC" or "Petitioner") are:

1. Whether the Board's findings and conclusions that CMC violated Section 8(a)(1) of the Act by explaining to employees that they should feel free to contact management if they feel they are being harassed or intimidated are supported by substantial evidence and reasonably consistent with the law?

2. Whether the Board's findings and conclusions that CMC violated Section 8(a)(1) on an unknown date and time by telling a small group of nurses, who were located in a working area and on working time, that it was inappropriate

to discuss their salaries and/or wages are supported by substantial evidence and reasonably consistent with the law?

3. Whether the Board's findings and conclusions that CMC violated Section 8(a)(1) of the Act by issuing a written verbal warning to Scott Marsland for attacking the competency of two of his co-workers in front of a large group of co-workers and physicians, after being asked at least three times to stop, was supported by substantial evidence and reasonably consistent with the law?

4. Whether the Board's findings and conclusions that CMC violated Section 8(a)(1) by maintaining employment policies that, among other things, required employees to be courteous and respectful, were supported by substantial evidence and reasonably consistent with the law?

5. Whether the Board's findings and conclusions that CMC violated Sections 8(a)(1) and (3) of the Act by disciplining, demoting and/or issuing an adverse performance evaluation to Anne Marshall, in part, pursuant to unlawful policies requiring courtesy and respect, were supported by substantial evidence and reasonably consistent with the law?

6. Whether the Board's findings and conclusions that CMC violated Section 8(a)(1) by interrogating Anne Marshall about her union activities and threatening her with unspecified reprisals unless she ceased union activities were supported by substantial evidence and reasonably consistent with the law?

7. Whether the Board's findings and conclusions that CMC violated Section 8(a)(1) of the Act by threatening an employee with unspecified reprisals and job loss in certain Facebook postings were supported by substantial evidence and reasonably consistent with the law?

8. Whether the Board's findings and conclusions that CMC violated Section 8(a)(1) of the Act by directing employees to cease distributing union literature are supported by substantial evidence and reasonably consistent with the law?

9. Whether the Board's findings and conclusions that CMC violated Section 8(a)(1) of the Act by prohibiting employees from distributing and posting union literature, or from distributing union literature in non-patient care areas on non-working time, including by removing and/or confiscating posted or distributed union literature, were supported by substantial evidence and reasonably consistent with the law?

STATUTES AND REGULATIONS

All applicable statutory provisions are contained in the addendum to this Brief.

STATEMENT OF FACTS

CMC is a community hospital that has been serving the people of Ithaca, New York, Tompkins County, and the surrounding communities for over 125 years. (JA-191). It has grown to become a large complex organization with over 1350 employees who are dedicated to providing quality care.

1199SEIU United Healthcare Workers East's (the "Union") campaign to organize approximately 350 registered nurses began in early 2015 and continued through the time of the May 2016 hearing in this case; however, at no point has the Union filed a petition for an election. The alleged unfair labor practices purportedly occurred between January and November 2015. The Administrative Law Judge's view of the evidence, and therefore the Board's, ignored CMC's proven efforts throughout the relevant time period to respect the rights of all employees under Section 7 of the National Labor Relations Act (the "Act" or "NLRA"), including those who favor unionization and those who do not. (JA-192--194). Similarly ignored was the fact that a constant theme in CMC's written communications to the nurses about the Union campaign was that, "[a]s employees

of CMC, [nurses] have the right to advocate in favor of a union; [nurses] also have the right to advocate against union representation (within the guidelines of [CMC's] existing solicitation policy requiring that solicitations only occur between employees during non-work time), [and that CMC] respects these rights regardless of [each nurse's] viewpoint on this subject." (See JA-245 and JA-250-251).

Because each individual alleged violation involves a specific set of facts, and for the sake of efficiency, additional facts as relevant to each alleged violation are set forth in detail below.

STATEMENT OF THE CASE

This case arises out of a series of unfair labor practice charges filed by the Union alleging violations of the Act by CMC. The Board, through its Regional Director, investigated these charges, and on February 26, 2016, issued an order consolidating the cases and a complaint and notice of hearing alleging CMC had violated the Act.

CMC filed a timely answer on March 11, 2016. A hearing was held before Administrative Law Judge David Goldman ("ALJ"), and on October 28, 2016, ALJ Goldman issued a proposed decision and order finding that:

- CMC violated Section 8(a)(1) of the Act, since about April 28, 2015, by maintaining a Nursing Code of Conduct that includes provisions requiring employees to be courteous and respectful toward one another. (JA-567-571).

- CMC violated Section 8(a)(1) of the Act, on or about May 7, 2015, and August 26, 2015, by issuing unlawfully overbroad solicitations to employees to report coworkers for harassing or intimidating behavior. (JA-571-573).

- CMC violated Section 8(a)(1) of the Act, on or about July 8, and within a couple of days thereafter, by directing employees to cease distributing union literature in the cafeteria. (JA-573-574).

- CMC violated Section 8(a)(1) of the Act, on an unknown date by informing a small group of nurses at the nurses' station that it was inappropriate to be discussing salaries and/or wages. (JA-574-575).

- CMC violated Section 8(a)(1) of the Act, on or about May 8, 2015, by interrogating an employee about her union activities and threatening an employee with unspecified reprisals in a one-on-one meeting unless she ceased her union activities. (JA-575-577).

- CMC violated Section 8(a)(1) of the Act, from May 2015 through mid-July 2015, by prohibiting employees from distributing and posting union literature around the Respondent's facility while permitting employees to distribute and post other literature. (JA-577-578).

- CMC violated Section 8(a)(1) of the Act, on or about November 10 and 11, 2015, by threatening employees on Facebook with unspecified reprisals

and with job loss in retaliation for employees' protected and concerted activities. (JA-578-581).

- CMC violated Section 8(a)(1) of the Act, on or about October 5, 2015, by issuing employee Scott Marsland discipline in the form of a "verbal written warning" because his statements regarding the competency of two nurses constituted protected and concerted activity. (JA-581-587).

- CMC violated Section 8(a)(3) and (1) of the Act, on or about June 26, 2015, by suspending, warning, demoting, and giving an unfavorable performance evaluation to employee Anne Marshall in retaliation for her union activities. (JA-587-604).

CMC filed timely exceptions to the ALJ's decision with the Board on November 25, 2016. The General Counsel cross-filed exceptions.

On December 16, 2017, the Board issued its Decision and Order affirming the ALJ's rulings, findings, and conclusions, except that it (1) severed certain allegations concerning the maintenance of the Nursing Code of Conduct; and (2) the 2-1 Board Majority imposed the additional extraordinary remedy of requiring a member of CMC management to read the notice posting aloud to employees. (JA-563-564). As set forth below, Member Miscimarra dissented to a number of findings of the 2-1 Majority. (JA-562-565).

SUMMARY OF ARGUMENT

The Board's findings and conclusions are not supported by substantial evidence and/or are inconsistent with established Board law. Specifically:

1. CMC's facially-neutral communications inviting employees to report instances of harassment and intimidation, which were drafted after receiving reports from employees, do not violate the Act and are lawful pursuant to established Board law. *See Ithaca Indus.*, 275 NLRB 1121, 1126 (1985); *First Student, Inc.*, 341 NLRB 136, 137 (2004).

2. The finding that CMC unlawfully told a group of employees that it was "inappropriate" to discuss wages and/or salaries as the only evidence submitted on the topic came from a less than credible witness who could not even establish the year the comment was allegedly made or the context in which the word "inappropriate" was used is not supported by substantial evidence.

3. CMC lawfully issued a verbal warning to Scott Marsland for calling two of his co-workers incompetent at a staff meeting because: (1) his conduct was not concerted as the attack consisted of his own personal opinion about the two-co-workers and no employee at the meeting supported Marsland; and (2) assuming *arguendo* the conduct was concerted, his outburst lost protection under the four-factor analysis set forth in *Atlantic Steel*, 245 NLRB 814 (1979), because, among

other things, his attack was insubordinate and likely constituted defamation under New York state law.

4. The Board's Decision finding that CMC unlawfully maintained an employment policy – its "Code of Conduct" – requiring employees to be courteous and respectful, is not consistent with current Board law. In *Boeing Company*, 365 NLRB No. 154 (December 14, 2017), the Board held that "rules requiring employees to abide by basic standards of civility" and "promoting harmonious interactions and relationships" are presumptively lawful because (1) such rules do not prohibit or interfere with the exercise of Section 7 rights or (2) the potential adverse impact on potential rights is outweighed by justifications associated with the rule. Therefore, the Board erred in requiring CMC to rescind and revise these policies.

5. The Board further erred by finding that Anne Marshall was unlawfully disciplined, demoted, and received a slight reduction in her performance evaluation for violating these lawful Code of Conduct policies. Assuming *arguendo* that *Boeing* does not require these employment actions be found lawful, CMC lawfully took each of these actions under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

6. The Board's Decision that CMC unlawfully interrogated and threatened Anne Marshall in a one-on-one meeting is not supported by substantial

evidence as Marshall's vague recollection of what was "basically" said in her conversation with Joel Brown, Interim Director of the ICU, is not sufficient to establish a violation of unlawful interrogation/threats where, as here, exact language and Mr. Brown's testimony that the statements alleged were never made is supported by contemporaneous documentation.

7. The Board erred in finding that certain threats and/or reprisals found in the Facebook postings of CMC Supervisor Florence Ogundele violated the Act. Ogundele's remarks were made in response to what she perceived as personal attacks on her religion and her integrity by Marsland, and there is not substantial evidence that this personal dispute on social media implicated the Act.

8. The Board's Decision finding that CMC unlawfully directed employees to cease distributing union literature in the cafeteria is not supported by substantial evidence nor consistent with the law. In order to find a violation for discriminatory enforcement of a no solicitation/distribution rule, there must be more than isolated instances as occurred here. *Avondale Industries*, 329 NLRB 1064, 1231 (1999). In addition, to the extent these isolated incidents constitute a violation, such violation was fully remedied, is *de minimis*, and does not require any corrective action.

9. Similarly, the Board's finding that occasional removal of pro-union material pursuant to an established practice of regularly removing non-business

related material constituted a violation is unsupported where the undisputed evidence established that CMC afforded pro-union employees every opportunity on a daily and constant basis over a year-long period to solicit one another during non-work time, to obtain signed union authorization cards from one another, and to distribute and post pro-union literature throughout CMC's facility.

STATEMENT OF STANDING

CMC is an employer within the meaning of Section 2(2) of the Act. 29 U.S.C § 152(2) and an "aggrieved" party within the meaning of Section 10(f) of the Act, 29 U.S.C. § 160(f). It therefore has standing under this statute to seek review of Board's final order in this Court.

ARGUMENT

I. Standard Of Review

When the Board is engaged in fact finding, the court assesses whether the Board's findings are supported by substantial evidence. *International Transportation Service, Inc. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006). The Board "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 378 (1998). The Court's "review must take into account whatever in the record fairly detracts from the weight of the evidence cited by the Board to support its conclusions; [and] will

not merely rubberstamp NLRB decisions." *Cleveland Construction, Inc. v. NLRB*, 44 F.3d 1010, 1014 (D.C. Cir. 1995).

While the Board is entitled to some deference, "Board orders will not survive review when the Board's decision has no reasonable basis in law," or "when the Board has failed to apply the proper legal standard" or "when it departs from established precedent without reasoned justification." *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 445-446 (D.C. Cir. 2004).

II. The Majority of the Board Erroneously Concluded that Petitioner Violated the Act By Advising Employees to Report Harassment or Intimidation

In a 2-1 finding, the Board upheld the ALJ's finding that two emails from CMC's Vice President of Human Resources, Alan Pedersen, to CMC nurses violated § 8(a)(1) because they contained the statements below:

> May 7 email:
>
> "If you feel you are being harassed or intimidated feel free to contact your supervisor, director or security."
>
> (JA-244, JA-195).
>
> August 26 email:
>
> "If you feel that you continue to be harassed you have every right to file a complaint in our incident reporting system, and notify your Director so that we can address the behavior with the individual involved."
>
> (JA-248-249)

(JA-562 fn. 1, JA-571-573).

Pedersen provided uncontroverted testimony that these emails were drafted in response to a number of CMC employees making complaints "that they had been subject to bullying or intimidation, and they wanted to know what steps they could take," and this intimidation included complaints that a "number of people felt as though they were being pressed to sign a card." (JA-195-196; JA-197-198).

The Board disregarded its own authority holding that employer communications relating to legitimate threats, harassment, and/or intimidation have been found not to violate the Act. *See, e.g., Ithaca Indus.*, 275 NLRB 1121, 1126 (1985) (it was lawful for an employer to tell employees that they should report coworkers who "intimidate" them while soliciting cards); *First Student, Inc.*, 341 NLRB 136, 137 (2004) (employer's request to report incidents where employees were confronted and forced or intimidated into supporting the union was lawful).

Furthermore, Pedersen's communications were even more innocuous than that language found lawful in *Ithaca Industries* and *First Student*. Unlike in *Ithaca Industries* and *First Student*, the statements contained in Pedersen's emails are not specifically directed at harassment or intimidation by pro-Union employees, but rather were broadly written to cover *any* harassment/intimidation by persons favoring the Union and/or by persons opposing the Union. The focus of these communications was requesting reports of threatening and intimidating behavior,

which the Board has found lawful. *See First Student*, 341 at 137.

Additionally, as recognized by Chairman Miscimarra in his dissent, inviting employees to report harassment is fully consistent with Title VII of the Civil Rights Act of 1964 and state law and local ordinances. (JA-562 fn. 1); *see, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Thus, the Board should not infringe or suggest to employers that it is illegal to invite their employees to report such harassment. Nevertheless, both the ALJ and the two-member majority seemingly disregard this legitimate concern relating to Title VII, the neutral wording used in Pedersen's emails, as well as the fact that Pedersen had repeatedly communicated to employees that they have the equal right to adopt and support pro-Union or anti-Union viewpoints. The cases cited by the Board and ALJ are inapposite as the employers in those cases explicitly referenced pro-union activity. *See, e.g., Bloomington-Normal Seating Co.*, 339 NLRB 191, 191, fn. 2 (2003) (management unlawfully told employees to report if they were "threatened or harassed about signing a union card"); *Niblock Excavating, Inc.*, 337 NLRB 53, 61 (2001) (employer statements directed at "union card solicitors"); *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998) ("The Board has held that employers violate Section 8(a)(1) of the Act when they invite their employees to report instances of fellow employees' bothering, pressuring, abusing or harassing them with union

solicitations").

Instead, Pedersen's emails are consistent with lawful language set forth in *First Student* and *Ithaca Industries*. Thus, the Board's decision here is not consistent with its own precedent and should not be enforced.

III. The Board Erred in Finding that CMC violated Section 8(a)(1) of the Act by Informing Employees that It is Inappropriate for the Employees To Discuss Salary/Wages

Next, the Board erroneously affirmed the ALJ's finding that on some unknown date, Pedersen violated the Act by allegedly telling Anne Marshall and a group of nurses (who Marshall could not identify and who did not testify) on one occasion that it was inappropriate to be discussing their salaries. (JA-574-575). Significantly, this alleged statement, which was not corroborated by any other witness, was denied by Pedersen.

More specifically, the ALJ credited Marshall's testimony finding that Pedersen walked by Marshall and four or more nurses together at the nursing station – a working area and while the nurses were on working time – discussing the starting salary of new nurses. (JA-55). Pedersen allegedly "said it was inappropriate." (JA-55).

Indeed, this was virtually the full extent of the testimony on the subject, as Marshall was the only nurse called to testify about the alleged incident. Moreover, there was no additional detail provided concerning the context of the discussion or

what specifically was "inappropriate" (*i.e.*, it could have been the location of the discussion during working time vs. the topic). Further, Marshall could not even establish when this event occurred. She first claimed it was in fall of 2015 and when later questioned, stated it may have been winter of 2016, and admitted she did not know the date or even the year of the conversation. (JA-55, JA-97-98). This "evidence" of an unknown time with very limited context of the event, does not amount to substantial evidence to support an unfair labor practice finding. Additionally, because the General Counsel could not establish the time when the statement was made, it failed to meet its burden to establish the violation took place within the 6-month statute of limitations. *See* 29 U.S.C. § 160(b).

The substantial evidence standard cannot be met here because: (1) the statement is not uncorroborated and there is little to no context of what Pedersen referred to as "inappropriate"; (2) the only individual alleged to have heard the statement cannot name the season, let alone the date of when the alleged statement was made; (3) the ALJ acknowledged Marshall's dishonesty with regard to at least one other significant subject (JA-599, fn. 54); and (4) Pedersen credibly testified he never made the statement. Accordingly, this Court should decline to enforce the Board's Decision as there was not substantial evidence to find Pedersen directed employees not to discuss salary/wages.

IV. Scott Marsland Did Not Engage in Concerted and Protected, Activity; Instead, He Engaged in an Individualized and Disparaging Attack on the Competency of Two Co-Workers in Which No Other Employees Joined

There is no evidence, let alone substantial evidence, to support the Board's finding that RN Scott Marsland engaged in protected, concerted activity at a September 24 staff meeting. (JA-581-587). At this meeting, Marsland, despite being asked by his supervisor to stop at least three times, engaged in a disparaging attack on the competency of two other nurses. Marsland made these comments in front of his eleven co-workers, who were familiar with the two nurses, and in the presence of physicians and physician's assistants. None of these other individuals joined or in any way supported his individualized attack on the competency of these two nurses at this time or at any later date. (JA-127, JA-138-139, JA-148, JA-115-116, JA-153-158).

One of the nurses Marsland called incompetent became aware of what was said at the meeting, and she responded by breaking into tears and becoming terribly upset. (JA-151-152). Marsland formulated an apology to this nurse on his own accord immediately after making the statements and later acknowledged that his behavior was inappropriate. (JA-403).

Accordingly, Marsland was properly issued a verbal warning (that was documented in writing) for this conduct. However, the Board and ALJ erroneously

found that this warning violated § 8(a)(1) because the conduct was concerted, and did not lose the protection of the Act.

A. Marsland's Conduct Was Not Concerted

To warrant the protection of the Act, Marsland's conduct must have been "concerted." Concerted activity under *Meyers Indus.*, 281 NLRB 882, *aff'd sub nom Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), may be found when an employee's activity is undertaken with or on authority of other employees as opposed to solely on behalf of the employee himself; or when an individual brings a group complaint to the attention of management. *Id.* The record lacks substantial evidence to establish that Marsland's conduct constitutes concerted activity under *Meyers*.

As noted, there were eleven staff members present at the September 24 staff meeting led by Director of the Emergency Department, Amy Mathews. Marsland's inappropriate conduct began when he asserted that another nurse (Deb Scott) was not "competent to care for [Marsland's] patients." (JA-127, JA-138-139, JA-148, JA-115-116, JA153-158). Mathews instructed Marsland that this was the first she had ever heard of this; that this was not the proper forum for alleging that another staff member was incompetent; and that Marsland should come see her if he would like to discuss this further. (JA-148, JA-160).

However, Marsland persisted, despite being asked to stop at least three times, in disparaging his colleague and damaging her reputation in front of many of her colleagues; insisting, that in his opinion, she was not competent. (JA-138-139, JA-148-150). Continuing to defy Mathews, Marsland then proceeded to name and attack the competency and qualifications of another nurse, stating she was not competent and that she was like a "nursing student." (JA-128, JA-150). Marsland was issued a verbal warning (which was documented) for this conduct. (JA-153-158). Specifically, he was disciplined for tearing down and attacking the competency of two co-workers in front of a group of employees.

There is no evidence that any other employees at this meeting agreed with or joined in with Marsland's opinion. Nor was there any evidence that the competency of these two nurses was ever raised again by any other CMC employee besides Marsland. The only alleged evidence consists of Marsland's testimony that the competency of one of the nurses (Deb Scott) was allegedly something that "we often spoke to each other about." (JA-125). However, this testimony, and Marsland's contention that this was a group concern, is belied by the fact that not one other nurse supported Marsland in this meeting, nor was the competency of these two nurses subsequently raised to management by anyone but Marsland. (JA-127-129; JA-398-410; JA-397).

The ALJ's finding, adopted by the Board without comment, finds that the comments were "concerted" because they related to staffing concerns and that "the discussion of not getting breaks is part of the air we breathe at Cayuga Medical Center." (JA-581-587). However, the fact that Marsland made these comments in the context of a staffing discussion is insufficient to establish the public disparagement of the nurses was a concerted group concern, as opposed to Marsland's individual viewpoint. Accordingly, the verbal warning should be upheld and the Board's decision should not be enforced.

B. Marsland's Conduct Lost the Protection of the Act Under *Atlantic Steel*

Assuming *arguendo* that Marsland's conduct was concerted, the Board's Decision must still be overturned because his conduct was sufficiently opprobrious to lose protection under *Atlantic Steel*, 245 NLRB 814 (1979). Under *Atlantic Steel*, the Board evaluates four factors to determine if conduct is so egregious as to lose protection of the Act: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by an unfair labor practice. *Atlantic Steel*, 245 NLRB at 816. Applying the four-factor test here, Marsland's conduct was not protected as his attack on the competencies and qualifications of the two nurses persisted over the repeated objection of Mathews, and the attack was made in a public forum in front of the nurses' co-workers.

Under the first factor – the place of discussion – the inquiry is focused on whether the comment would "disrupt the Respondent's work process." *See Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007). Statements regarding the purported incompetence of nurses in front of their co-workers not only subjects them to unnecessary humiliation, but it could likely lead to a refusal to work with the nurses in the future; thus disrupting the work process. Accordingly, this factor weighs against a finding of protection.

As for the second factor – subject matter – while the conversation began as a general discussion of staffing, it devolved into Marsland's personal opinion that his two co-workers were incompetent. His personal attack on these two co-workers is not a subject matter that Section 7 protects. This factor, therefore, also weighs against a finding of protection.

The third factor – the nature of the outburst –should also weigh against a finding of protection, contrary to the ALJ's and Board's finding. The ALJ and Board found that this factor weighed in favor of protection because the outburst: (1) was not insubordination, which is unprotected, but instead was "rude and defiant" behavior, which is protected; and (2) Marsland did not yell or use profanity. This analysis ignores that this outburst:

- Likely qualifies as defamation under New York state law (*see, e.g.*, *Verdi v. Dinowitz*, 2017 N.Y. Misc. LEXIS 3753, at *6-7 (N.Y. Sup.

Ct. Sept. 28, 2017) (finding that by calling plaintiff "incompetent," there "is little question they subjected plaintiff to public ridicule" and that disparaging a person in their profession is defamation *per se*));

- Resulted in one of the nurses becoming emotionally distraught; and
- Was an obvious act of insubordination as Marsland talked over the repeated requests of his supervisor to stop, and her reasonable request to raise any concerns he may have with the competence of the nurses in question with her in a different more private forum.

To be clear, during this outburst, Marsland: (1) engaged in an obvious act of insubordination as he ignored Mathews' repeated instructions to stop, which alone renders his conduct unprotected; and (2) attacked two employees' livelihoods in front of a number of their co-workers – who need to rely on them in the high-stress environment of a hospital. While Marsland did not use profanity or yell, his personal attack on two nurses' qualifications and competencies is a far more sinister and potentially harmful outburst than someone simply raising one's voice or uttering a profanity. The ALJ's, and therefore Board's, simplistic focus on yelling and profanity underplays the significance of the words that Marsland used.

Finally, the ALJ acknowledged that the fourth factor, whether an unfair labor practice provoked the outburst, weighs against protection.

Accordingly, reviewing the evidence as a whole, even under the Board's deferential standard, all four of the *Atlantic Steel* factors weigh against protection and thus, Marsland's verbal warning was not unlawful.[1] Thus, this Court should decline to enforce the Board's Decision.

V. The Board Majority Erred in Finding that the Civility Policies in CMC's Code of Conduct, For Which Marshall Was Disciplined, Were Unlawful

In its decision, the Board found that CMC violated the law by enforcing and disciplining Anne Marshall for violating CMC's "Customer Service" policy found within CMC's Nursing Code of Conduct which states that employees are required to: "interact[] with others in a considerate, patient, and courteous manner," and be "honest, truthful, and respectful at all times." (JA-563). The Board found that Marshall was demoted and given a verbal warning on July 10, 2015 for violating these provisions of the Nursing Code of Conduct and ordered that such provisions be rescinded or revised. (JA-563). In addition, Marshall received a negative performance evaluation, in part, for her violations of this Code of Conduct, as well as her conduct which led to a one-day suspension and constituted a violation of

[1] In addition, the ALJ noted that the General Counsel's other theory of liability, that Marsland was unlawfully disciplined under an unlawful rule would also serve as alternative grounds for a violation. (JA-586-587). However, as set forth below, under *Boeing*, *infra*, the policy for which Marsland was disciplined, i.e., rule against criticizing co-workers and staff in front of others, is a lawful courtesy policy under Category 1 of *Boeing*, and therefore, under current Board law, this violation cannot be upheld on these grounds.

basic civility standards. (JA-563). The Board reasoned that CMC's policies were unlawful because they required employees to act professionally toward other staff members, not just customers, and therefore, restricted Section 7 rights. (*Id.*).

However, since its decision in this case, on December 14, 2017 the Board in *Boeing Company*, 365 NLRB No. 154, specifically addressed the lawfulness of such "courtesy and professionalism" policies, finding that its application of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) ("*Lutheran Heritage*") had become untenable. More specifically, under *Lutheran Heritage*, the Board held that a facially neutral employer policy will be unlawful under § 8(a)(1) of the Act if an employee would reasonably construe the language of the policy to prohibit Section 7 rights, which had previously resulted in policies requiring courtesy, respect and professionalism towards co-workers to be unlawful. *Boeing*, 365 NLRB at p. 1. In *Boeing*, the Board reasoned that the "reasonably construe" standard, as it's called, has resulted in vast confusion over the application of the standard, and is contrary to both U.S. Supreme Court and Board precedent. *Id.* at 2, 7-8. The Board established a new standard[2], and explicitly found that rules requiring employees to abide by basic civility standards are lawful *per se*. *Id.* at

[2] The Board held that when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, it will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

14-15. Specifically, the Board found that "rules requiring employees to abide by basic standards of civility" and "promoting harmonious interactions and relationships" were lawful because such rules do not prohibit or interfere with the exercise of NLRA rights or the potential adverse impact on potential rights is outweighed by justifications associated with the rule. *Id.* at 3-4, fn. 15.

Accordingly, the Board erred in requiring CMC to rescind and revise these policies, and to the extent CMC relied on the Customer Service provisions of its Nursing Code of Conduct in disciplining Marshall, such policies, which require civility and courtesy, are *per se* lawful under the Board's *Boeing* decision and the corresponding discipline was also lawful. Accordingly, this Court should overturn the Board's decision, or at the very least, remand to the Board to reevaluate based on the new standard set forth in *Boeing*.

VI. The Board Erroneously Concluded that CMC Violated Sections 8(a)(1) and (3) of the Act by Disciplining, Demoting and/or Issuing an Adverse Performance Evaluation to Anne Marshall

At all relevant times, Anne Marshall, discussed above, was an RN in CMC's ICU. It is undisputed that at all relevant times Marshall was openly supportive of unionization, and that CMC was aware of her pro-Union viewpoint and her organizing activities. The Board found that CMC discriminated against Marshall due to her Union support and acted with a retaliatory motive when it: (1) suspended her for one day on June 26 due to an incident of misconduct; (2) issued a documented verbal warning to her on July 10 due to another incident of misconduct; (3) demoted her from her Charge Nurse position to a regular Staff Nurse position on August 31 due to further acts of misconduct and a failure to carry out her Charge Nurse responsibilities; and (4) issued an unfavorable performance evaluation on October 30. (JA-587-607). As set forth above, all of this conduct violated the Code of Conduct policy, and therefore, based on *Boeing*, the discipline should be overturned, or at the very least, remanded.

Even in the absence of *Boeing*, the record evidence establishes that each of these actions were based on legitimate reasons in response to Marshall's acts of misconduct, and the Board's finding of an unlawful retaliatory motive is not supported by substantial evidence.

Indeed, the evidence in the record concerning the legitimate reasons for disciplining Marshall consists of extensive, detailed and highly specific contemporaneous documentation from multiple witnesses; consistent and credible testimony from multiple witnesses all corroborating one another, including one key witness who no longer works for CMC; and various grudging acknowledgements and admissions from Marshall, and in a couple of instances from other witnesses called by the General Counsel. That evidence stands in contrast with self-serving testimony by Marshall whose testimony was inconsistent and contradictory in several respects; as well as the general absence of any corroborating testimony from any other witnesses.

For all of these reasons, and those set forth in detail below, CMC respectfully submits that the Board's findings and conclusions are not supported by substantial evidence.

A. Marshall's July 10, 2015 Verbal Warning and Removal From the Charge Nurse Positon Were Lawful

In a series of incidents on August 28th, Marshall exhibited extremely rude and disrespectful behavior upon first meeting her new immediate supervisor, the brand new Interim Director of the ICU, Sandra Beasley. Over the course of twenty-four hours, Marshall engaged in following rude and disrespectful conduct towards her brand new supervisor:

- Flipping off Beasley during their initial interaction, (JA-208-209);
- Purposely refusing to escort Beasley to a morning bed meeting, (JA-189);
- When questioned by Beasley about why she did not escort her to the meeting Marshall stated in sum or substance: I am not your babysitter you can find yourself there, (JA-189); and
- Refusing to help fill-in scheduling holes because Marshall did not feel it was her job even though that is a key role of the Charge Nurse position. (JA-189).

It defies logic to think that any employee, regardless of protected Union activity could engage in such flagrantly disrespectful behavior towards her new unit director and not suffer some consequence. As Team Leader and Charge Nurse, Marshall was not only expected to lead by example for the other nurses, but provide assistance to hospital management with ensuring adequate staffing to meet patient care needs. (JA-205, JA-220). Thus, it can be no surprise that the new Interim Director of the ICU would not want an employee on her leadership team, who on the first day of meeting her, showed such flagrant disrespect toward her.

Accordingly, as a result of Marshall's unacceptable behavior, she was demoted from the Team Leader and Charge Nurse role and returned to a regular staff nurse role. Once again this decision had everything to do with her misconduct and nothing to do with her union support.

Consistent with this behavior, on July 3rd, 2015, Marshall engaged in an aggressive and confrontational dialog with her immediate supervisor, Brown, about getting Ward Clerk help. (JA-233). Marshall proceeded to angrily follow Brown around, violating his personal space, and blocking his movements, despite Brown asking Marshall to step away from him. (JA-234). Marshall refused and proceeded to block the doorway to his office despite repeatedly being asked by Brown to leave until finally he had to threaten to call security. (JA-234-235). Marshall received the July 10 documented verbal warning for this unacceptable behavior. Once again, the verbal warning had everything to do with her misconduct and nothing to do with her union support.

Indeed, under the *Wright Line* analysis, Marshall would have been disciplined for both of the above interactions in the absence of union activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

Indeed, the Board seemingly did not consider CMC's comparator evidence. While the nature and extent of Marshall's conduct was somewhat unprecedented, CMC was able to find at least five other similarly-situated employees who were disciplined for engaging in comparable violations for failing to uphold professional standards/Code of Conduct. (JA-467-471). This evidence includes a written warning for a lost temper and foul language; a 3-day suspension for violating the

employee conduct policy; a final written warning for explosive and aggressive profanity and a suspension for exhibiting threatening behavior toward peers and criticizing coworkers; and a verbal warning for a heated argument. (JA-467-471).

These examples demonstrate that certain standards of performance and behavior have been expected and shortfalls have been addressed through formal disciplinary action over a period of many years and long before the Union organizing campaign. Indeed, this evidence indicates that CMC showed leniency toward Marshall compared to other similarly-situated employees. The ALJ ignored this evidence, and his analysis effectively cloaks union supporters with immunity from enforcement of the employer's rules. This is erroneous as a matter of law, and the ALJ's and Board's conclusion that the July 10 verbal warning and August 31 demotion were unlawful is not supported by substantial evidence.

B. The Remaining Personnel Actions Concerning Marshall Were Also Based on Legitimate Factors and Were Not Unlawful

(1) Marshall's June 26 One-Day Suspension Did Not Violate the Act.

Marshall admitted that one of the responsibilities of Team Leaders and Charge Nurses at CMC is to make calls to off-duty nurses to ask if they are willing to come in to help meet patient needs by filling holes in the schedule and/or because of changes in patient census or patient acuity. (JA-87). However, her testimony relating this point was revealing. When first asked on direct

examination who is responsible for filling holes in the schedule, Marshall provided a seemingly rehearsed response incorporating deliberate vagueness, that "Ultimately it's the director, but we all try to help." (JA-48-49). Later when asked how often she personally has tried to fill-in scheduling holes when in her role as Charge Nurse, she responded multiple times a week. She went on to testify that normally "we" look at the next shift coming on and try to fill those holes first, and that "we would text people and call people." When ALJ Goldman interjected by asking Marshall who the "we" was that she was referring to, she responded by acknowledging that it just meant the Charge Nurse or Team Leader for that shift. (JA-49-50).

Thus, the undisputed evidence in the record establishes that a key responsibility and consistent expectation for the role of Charge Nurses is to call off-duty nurses to try to secure more staffing on an as-needed basis as directed by the Director/Interim Director of the ICU, and that this occurred on almost a daily basis. Marshall's refusal to do so constituted both a dereliction of duty and an act of insubordination. Thus, her one-day suspension was entirely warranted and not unlawful.

The detailed events leading up to the June 26 suspension are fully described in the contemporaneous documentation consisting of JA-438-450, JA-451, and JA-454-462, as well as JA-472-519. These events and the evidence gathered and

relied upon in the resulting investigation were also described in the testimony primarily by Respondent witnesses Norman Joel Brown, Florence Ogundele, and Linda Crumb. In summary, after some problems with Marshall's behavior beginning on June 25, on June 26th, the ICU where Marshall was working as Charge Nurse was experiencing a staffing crisis. The situation was emergent because a very critical patient needed to go from surgery to the ICU, and the patient was at risk for being transferred out to a different hospital unless additional ICU nurses could come in.

Interim ICU Director Joel Brown conferred with the House Supervisor Flo Ogundele about the situation and both of them discussed the situation with Marshall in her capacity as Charge Nurse. Brown asked Marshall to start making calls to see if any nurses would come in. Marshall responded by stating that had already made the calls and no one was willing to come in. Brown then went to his office to start making calls, and the first nurse he called agreed to come in immediately. Brown then went to Marshall and asked her for a list of the nurses she had called so he would not be duplicating her efforts by calling anyone twice. Marshall then stated to both Brown and Ogundele that there was no list because she really hadn't made any calls. Thus, Marshall lied the first time when she said she had already made calls and no one would come in, and she exhibited a lack of

cooperation by effectively refusing to assist with an emergent situation that could have placed a patient in jeopardy.

As a result, Marshall was suspended for the remainder of that shift and the next shift. This had everything to do with her misconduct and nothing to do with her Union activity. Accordingly, the Board's finding that Marshall's June 26 suspension was unlawful should be reversed.

(2) The October 30 Performance Evaluation of Marshall Did Not Violate the Act

With respect to Marshall's 2015 performance evaluation, normally Department Directors conduct the annual performance evaluations for the staff nurses, but in 2015 Assistant Vice President of Patient Services Linda Crumb conducted them. This is because the longstanding former director had left and the interim directors who followed lacked sufficient time upon which to base an evaluation. Thus, Crumb advised the ICU nurses in a staff meeting that for 2015 they would start with the same rating as they had in 2014, then she would review the personal accountability section of the evaluation and set goals for next year. (JA-32-34, JA-210).

The personal accountability section includes licensure, mandatory attendance and work behaviors, among others. (JA-211, JA-387-394 and JA-377-386). For the personal accountability section in 2015, Marshall lost one point for demonstrating unacceptable behavior. This loss was based on her dishonesty

regarding call-ins on multiple occasions and her dishonesty during the evaluation period. (JA-213). As demonstrated above, and as admitted in part by Marshall, Marshall's multiple acts of misconduct resulted in disciplinary measures that were entirely legitimate, and, thus, her one point reduction on her evaluation reflecting these behaviors was also entirely legitimate. (JA-213-214). Also, contrary to the ALJ's assertions, there was uncontroverted testimony that other nurses also had lost one point from their 2014 to their 2015 overall evaluation score for various reasons. (JA-213).

For all of the above reasons, we respectfully submit that the Board erred in finding that the October 30 performance evaluation of Marshall was unlawful. The evidence establishes that CMC would have docked Marshall a point on her evaluation even in the absence of her protected activity. Further, because the point was related to her violations of lawful policies under *Boeing*, and the disciplinary actions upon which the reduction was based were taken for lawful reasons, there can be no violation.

VII. The Board Erred in Finding that CMC Violated Section 8(a)(1) of the Act by Interrogating and Threatening Employees in a One-On-One Meeting

The Board affirmed the ALJ's finding that the Interim Director of the ICU, Joel Brown, unlawfully interrogated and threatened Marshall in a one-on-one meeting. Once again, this finding is based solely on the testimony of a single

witness – Marshall – who the ALJ stated was not credible on at least one other significant issue in this case[3]. (JA-599, fn. 54). Further, Marshall's recollection was unreliable and she was only able to provide a vague summary of the events. (JA-574-575). In an area of law where language is critical and distinctions are razor-thin, a recollection of "basically" what someone said or was attempting to say is insufficient and falls below the substantial evidence standard.

The primary evidence introduced by the General Counsel in support of Paragraphs 8(a) and (b) of the Complaint was testimony from one witness, Marshall, about a single instance of an alleged interrogation and threats. Her testimony was directly contradicted by testimony from Brown. Contrary to the ALJ's, and therefore the Board's, decision, given the disparity in accounts between Marshall's (incredible and vague) and Brown's (credible and corroborated by contemporaneous documentary evidence) testimony, there was not substantial evidence to find a violation.

In April 2015, Brown conducted one-on-one meetings with all nurses in the ICU to present them with information regarding the Union's organizing campaign. On direct examination, Marshall testified that, "I sat down in [Brown's] office and

[3] In addition, it should be noted that Marshall filed a harassment claim against Brown with the New York State Division of Human Rights, which the New York State Division of Human Rights found to be unsubstantiated, reflecting upon Marshall's credibility and animosity toward Brown. (JA-85-86).

he ***basically*** told me that he knew I was the ring leader and I was the one promoting all this union stuff, and if it didn't stop he was going to get HR involved." (JA-58) (emphasis added).

In contrast, Brown stated that he worked off a list of talking points provided by Human Resources and Senior Leadership that he handed to each employee and which guided his discussions. (JA-222-224, JA-416-419). With regard to Marshall, Brown testified that he went through the fact sheet with Marshall; that Marshall asked him if he had ever worked at a union facility; and that he answered yes, he had. (JA-224). Brown testified that he never used the word ringleader and he never said anything about going to HR. (JA-225).

Marshall's uncorroborated assertion that Brown simply ignored the talking points and blatantly interrogated and/or threatened her concerning her union activity lacks credibility. Perhaps most telling, the General Counsel only produced one other witness, Terrie Ellis, out of 350 registered nurses at CMC and 22 in the ICU, concerning her meeting with Brown. Conspicuously absent from Ellis' account of the meeting was any allegation that Brown threatened to report her or any other known Union supporters to HR. (JA-101, JA-102).

Accordingly, we respectfully submit that the Board's findings are not supported by substantial evidence, and the finding that CMC unlawfully interrogated and threatened employees should not be enforced.

VIII. The Board's Findings that CMC Violated Section 8(a)(1) of the Act By Threatening Employees with Reprisals and Job Loss in Relation to Certain Facebook Postings Should Not Be Enforced

The Board affirmed the ALJ's findings that certain Facebook postings by one CMC supervisor threatened employees with unspecified reprisals. The evidence in the record is somewhat confusing, but it appears that Marsland posted a comment on Facebook under the alias "Charlie Green", in which he attacked House Supervisor Florence ("Flo") Ogundele's integrity by stating that Marshall was "standing up for what is right" in connection with a claim of sexual harassment she filed against Brown, by "facing down Flo Ogundele" along with other named management representatives and their counsel at an upcoming appearance before the New York State Division of Human Rights. (JA-257).

Marsland acknowledged that he posted more about Ogundele on Facebook than appears in JA-257, and Ogundele testified that there were more personal attacks in Marsland's postings than shown in the record, including a statement to the effect that she had sold her soul to the devil, which Ogundele, who is a religious person, found deeply offensive. (JA-178-179, JA-181-182).

Ogundele responded in anger by posting a message on Facebook stating that she does not compromise her integrity to lie for anyone; that she cannot be bullied or intimidated; and advising Marsland not to mess with her, and to tell his disciples the same. (JA-258). In a subsequent related posting on Facebook, Ogundele stated that

she took her first posting down after being instructed to do so by her boss (*i.e.*, CMC Assistant Vice President for Patient Services Linda Crumb), then proceeded to express her distaste for all the "bullshit" going on at work. (JA-259).[4]

Ogundele believed that her comments were personal in nature and not conveyed in her capacity as a management representative of CMC, but in any event, when CMC learned about this, she was instructed to immediately take down the offending comments and she received a disciplinary warning for her unsanctioned and inappropriate statements on social media. (JA-179-180, JA-184-185; JA-453).

To support the contention that Ogundele's Facebook postings violated Section 8(a)(1), it must be inferred that: (1) Ogundele's anger was directed at Marsland's Union support, even though her postings never mention the Union and she was clearly addressing his defamatory and spiritually offensive statements toward her; (2) that her vague comments were directed at all Union supporters, even though her comments do not mention the Union; (3) that her admonitions about messing with her and picking on the wrong girl suggested that she would invoke her authority in the workplace to respond, even though her words and tone were personal in nature and said nothing about acting in her capacity as a CMC Supervisor to impose potential discipline or other adverse employment actions; and (4) that any CMC employees who may have

[4] The General Counsel also introduced a third unrelated Facebook posting by Ogundele but was unable to establish when this posting occurred or in what context it occurred. (JA-260-261).

read her postings would have reasonably interpreted them as conveying threats of employment-related reprisals due to their Union support, even though the postings say nothing about this and were related to an entirely different issue.

We respectfully submit that such leaps cannot reasonably be inferred from the words Ogundele used or from the context in which she used them, and therefore, this finding cannot be upheld. *Allentown Mack*, 522 U.S. 359 at 378 (the Board may only draw "inferences that the evidence fairly demands"). Instead, the true nature of Ogundele's remarks seems quite obvious – she took great personal offense from what she perceived as an attack on her personal integrity and religious beliefs, and she lashed back in response. We therefore submit that a reasonable construction of this interaction on social media does not amount to a violation of § 8(a)(1).

IX. The Board Erred in Finding that Petitioner Violated Section 8(a)(1) of the Act by Directing Employees to Cease Distributing Union Literature

The Board erroneously affirmed the ALJ's finding that on or about July 8, 2015, CMC unlawfully interfered with tabling on behalf of the Union in CMC's cafeteria. This conclusion is predicated on two instances wherein Vice President of Human Resources Alan Pedersen indicated to two different employees his belief that the display was inappropriate. Importantly, neither instance resulted in the confiscation of materials or a threat of discipline. Additionally, upon further review of the issue, management adopted a hands-off approach, allowing

employees to engage in tabling in the cafeteria on a frequent basis over the ensuing days, weeks and months.

More specifically, Pedersen testified that upon first encountering employee Marshall sitting at the entrance to the cafeteria with all of her union materials, he told her that she "really shouldn't be doing that here," after which she picked up her materials and left. (JA-18-19).

A day or two later upon encountering employees Scott Marsland and Erin Bell inside the cafeteria with two tables pulled together and union literature spread across the two tables, Pedersen again told them that they shouldn't be doing that here. (JA-19). The cell phone video of the encounter (and resulting transcript) reveal that Pedersen actually said: "You're not allowed to set up a fixed presence in the cafeteria. You can, if you want to talk and solicit and have conversations with people, you can do that. You are not allowed to do this." (JA-428-431).

Marsland responded that the union had informed him he had a right to do this, to which Pedersen disagreed, and said: "So I'll have security come and take this away then." (JA-428-431). Pedersen reiterated that maintaining a fixed presence was inappropriate, to which Marsland responded that that was not his understanding of the law, and that maybe some clarification was needed. Pedersen simply responded, "Okay", and that was the end of the interaction. (JA-428-431).

Pedersen's initial concern was based on the unprecedented and disruptive placement of the table at the very entrance to the cafeteria. He did not impose an outright ban on pro-union tabling activity.

Significantly, Marsland and Bell did not leave or remove their materials (JA-135-137); Pedersen did not call security or otherwise attempt to confiscate or remove any materials (JA-21), and Pedersen did not threaten to discipline or take other adverse action (JA-22). Indeed, Marsland testified that he and Bell stayed and continued tabling for about an hour after their brief interaction with Pedersen with no further incident. (JA-135).

Thereafter, Pedersen consulted with labor counsel and determined that CMC would take a hands-off approach to tabling in the cafeteria by Union proponents. (JA-21). Tabling continued on multiple occasions thereafter over a period of several months on a frequent basis. (JA-21-22).

In previous cases, the Board has made clear that there must be more than isolated instances of discriminatory enforcement of a no solicitation/distribution policy in order for there to be a finding of disparate treatment and objectionable conduct. *See, e.g., Avondale Industries*, 329 NLRB 1064, 1231 (1999) ("single instance . . . does not prove disparate treatment"); *Albertsons, Inc.*, 289 NLRB 177, 178 fn. 5 (1988) (disparate application of rule not shown by isolated instances); *Kendall Co.*, 267 NLRB 963, 965 (1983) (disparate enforcement of policy not

shown by isolated deviations); *Uniflite, Inc.*, 233 NLRB 1108, 1111 (1977). The Board failed to acknowledge and/or apply this well-established line of cases, thus its decision in not consistent with law and enforcement of the Decision should be rejected.

Finally, because there was no discipline issued to employees for tabling on behalf of the organizing campaign, and such conduct was allowed to continue indefinitely throughout the campaign, to the extent CMC's initial response represents a violation, such violation was fully remedied, is *de minimis*, and does not require any corrective action. *Dieckbrader Express, Inc.*, 168 NLRB 867 (1967) (inconsequential violation insufficient to warrant violation of the Act).

X. The Board's Finding that Petitioner violated Section 8(a)(1) of the Act By Discriminatorily Prohibiting Employees from Distributing and Posting Union Literature Is Not Supported By Substantial Evidence or Board Precedent

The undisputed evidence establishes that CMC afforded pro-union employees every opportunity on a daily and constant basis over a year-long period to solicit one another during non-work time to obtain signed union authorization cards from one another to distribute and post pro-union literature throughout CMC's facility, and to engage in extensive tabling in the employer's cafeteria. (JA-197, JA-135-137; JA-70-72, JA-73-78; see also JA-245, JA-246-247, JA-250 and JA-251). Aside from the *de minimis* tabling issue discussed above, there is no allegation or evidence that any employees were ever prevented from posting or

leaving such material in CMC's facility; nor were any employees told they could not engage in this activity; nor was anyone counseled or threatened with discipline, nor given any discipline, for such engaging in such activity. (JA-199-200).

CMC does not dispute that one or more supervisors occasionally took down some pro-union postings, particularly after receiving complaints from other employees about the postings. (JA-226). The occasional removal of such material does not constitute an unlawful interference with Section 7 rights, particularly where, as here, the employer has an established practice of regularly removing non-business related material that is posted or left in its facility. JA-204). For these reasons, we respectfully submit that the Board's finding should not be upheld.

CONCLUSION

The Board disregarded and/or applied now overturned precedent in finding violations, and it failed to establish substantial evidence for any its unfair labor practice findings. Accordingly, CMC respectfully requests that its petition for review be granted, and that the Board's Decision and Order be denied enforcement.

Assuming, arguendo, the Court sustains any violations; a portion of the remedy should be reversed[5].

Dated: August 24, 2018
Syracuse, New York

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC

By: /s/ Raymond J. Pascucci
Raymond J. Pascucci
One Lincoln Center
Syracuse, NY 13202
Telephone: 315-218-8356
rpascucci@bsk.com
Attorneys for Petitioner

[5] The 2-1 Board Majority imposed the "extraordinary remedy" of reading the notice setting forth the violations of the Act aloud to employees. As the dissent properly argued, these violations are "not so egregious to warrant the extraordinary remedy of notice reading" (JA-564, fn. 9), and imposing such a remedy in this case will significantly lower the bar for imposition of what is intended to be an extraordinary remedy. Because traditional remedies will suffice, and this Court has only approved of such a remedy in cases with far more egregious circumstances than those present here, this portion of the order should not be enforced. *See, e.g., Conair Corp. v. NLRB*, 721 F.2d 1355, 1386 (D.C. Cir. 1983) (personal and repeated threats of closing the plant was the centerpiece of the company's anti-union campaign).

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the opening certificate, disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 9,580 words as determined by the word-counting feature of Microsoft Word.

Dated: August 24, 2018

By: /s/ Raymond J. Pascucci

Raymond J. Pascucci
One Lincoln Center
110 West Fayette Street
Syracuse, New York 13202-1355
Telephone: (315) 218-8356
Attorneys for Petitioner

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 24, 2018, on behalf of Petitioner-Cross-Respondent Cayuga Medical Center at Ithaca, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will send notification of such filing to the following counsel:

Ms. Julie B. Broido, Supervisory Attorney
julie.broido@nlrb.gov

Ms. Linda Dreeben, Deputy Associate General Counsel
appellatecourt@nlrb.gov

Ms. Kellie J. Isbell, Attorney
kellie.isbell@nlrb.gov

Dated: August 24, 2018

By: /s/ Raymond J. Pascucci

Raymond J. Pascucci
One Lincoln Center
110 West Fayette Street
Syracuse, New York 13202-1355
Telephone: (315) 218-8356
Attorneys for Petitioner

ADDENDUM

STATUTORY ADDENDUM

The relevant statutes and regulations are set out below in pertinent part:

NATIONAL LABOR RELATIONS ACT

Sec. 7. [29 U.S.C. § 157] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . .

Sec. 8. [29 U.S.C. § 158] (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment

membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made . . . .

Sec. 10 [29 U.S.C. § 160] (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because

of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .